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9 | *Attorneys for Defendant Walt Disney Pictures*

14 ARTHUR LEE ALFRED, II et al.,
15 Plaintiffs,
16 v.
17 WALT DISNEY PICTURES,
18
19 Defendant,

Case No. 2:18-CV-08074-CBM-ASx
DISCOVERY MOTION

**JOINT STIPULATION
REGARDING DEFENDANT'S
MOTION TO COMPEL
RESPONSES TO CONTENTION
INTERROGATORIES**

Judge: Hon. Alka Sagar

Hearing Date: April 26, 2022

Time: 10:00 a.m.

Place: Roybal Ctrm. 540

Pretrial Conf.: January 9, 2023
Trial Date: February 7, 2023
Discovery Cutoff: June 27, 2022

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1 This Joint Stipulation is submitted by the undersigned parties pursuant to
 2 Local Rule 37-2 in connection with Defendant Walt Disney Pictures' ("WDP")
 3 motion to compel Plaintiffs Arthur Lee Alfred II and Ezequiel Martinez, Jr. to
 4 respond to interrogatories. In accordance with Local Rule 37-1, the parties have met
 5 and conferred in good faith to resolve this dispute but were unable to do so.

6 **I. WDP'S INTRODUCTORY STATEMENT**

7 This is a copyright infringement case in which Plaintiffs allege that WDP's
 8 2003 motion picture *Pirates of the Caribbean: The Curse of the Black Pearl*
 9 ("Curse") infringes their Screenplay, which—like WDP's motion picture—adapted
 10 Disney's Pirates of the Caribbean theme park ride. It will be Plaintiffs' burden at
 11 trial to identify and prove which original elements of their Screenplay WDP
 12 infringed.

13 That is precisely the information that WDP seeks with four contention
 14 interrogatories that Plaintiffs refuse to answer. These interrogatories seek essential
 15 facts about Plaintiffs' contentions: Interrogatories 4 and 6 ask Plaintiffs to identify
 16 the elements of their Screenplay that WPD allegedly infringed and the elements of
 17 *Curse* that are allegedly infringing; Interrogatory 5 asks Plaintiffs to state all facts
 18 supporting their contention that each of the allegedly infringed elements in the
 19 Screenplay constitute original expression that is protectable by copyright; and
 20 Interrogatory 8 asks Plaintiffs to state all facts that support their contention that
 21 WDP copied their Screenplay.

22 Plaintiffs' primary objection is that these interrogatories are precluded by an
 23 earlier Court order bifurcating discovery pursuant to a stipulation of the parties.
 24 That order bifurcated early *expert* discovery on substantial similarity to facilitate the
 25 efficient disposition of early summary judgment motions, and importantly provided
 26 that discovery on "all issues" would open if the case proceeded beyond summary
 27 judgment. Declaration of Jordan D. Segall ("Segall Decl.") Ex. 4 [Dkt. 122] ¶ 7.
 28 Indeed, WDP *could not* have served the interrogatories at issue in discovery phase 1:

1 the Court’s bifurcation order specifically limited to discovery to initial disclosures,
 2 an exchange of expert reports on substantial similarity, and “one deposition of each
 3 side’s respective expert witnesses on substantial similarity.” *Id.* ¶ 5. The parties did
 4 not forfeit the opportunity to take *non-expert* discovery on substantial similarity. In
 5 any event, even if Plaintiffs’ interpretation of the discovery stipulation were viable,
 6 the interrogatories at issue are relevant to issues other than substantial similarity,
 7 such as independent creation and the Screenplay’s status as a derivative work of
 8 Disney’s intellectual property (namely, the theme park attraction). Even Plaintiffs
 9 concede these issues are appropriate topics for discovery at this stage.

10 Indeed, it is well-established that contention interrogatories are “generally
 11 proper” and serve the important purpose of narrowing the issues for trial.

12 *Stamps.Com, Inc. v. Endicia, Inc.*, 2009 WL 2576371, at *2 (C.D. Cal. May 21,
 13 2009). District courts in the Ninth Circuit have repeatedly compelled plaintiffs to
 14 answer contention interrogatories, in part because defendants “should not have to
 15 guess” about plaintiffs’ legal contentions or the facts supporting them. *Tennison v.*
 16 *City & Cnty. of San Francisco*, 226 F.R.D. 615, 618 (N.D. Cal. 2005).

17 WDP is particularly entitled to full and complete answers to these particular
 18 interrogatories because, in the five years they have been litigating this case,
 19 Plaintiffs’ account of what elements of their Screenplay were allegedly appropriated
 20 has been all over the map. In their original complaint, Plaintiffs alleged that the
 21 “Captain Jack Sparrow” character in *Curse* was substantially similar to the “Captain
 22 Davy Jones” character in their Screenplay because both are “depicted as having a
 23 sense of humor.” *See* Segall Decl. Ex. 5 [Compl., Dkt. 1] ¶ 13. The First Amended
 24 Complaint, by contrast, alleges that both works are similar because they depict
 25 “morally ambiguous” pirates with “significant alcohol problem[s].” *See id.* Ex. 6
 26 [FAC, Dkt. 112] ¶¶ 84–85. Plaintiffs then submitted an expert report from a
 27 comparative literature professor who identified a number of purported similarities
 28 that were not described in any pleading, including that both works feature “strong

1 female heroine[s]" and "pirate ships with skeleton crews"; "share a common theme
 2 of mentorship of male orphans"; and both "begin[] with a prologue." *Id.* Ex. 7
 3 [Román Report, Dkt. 112-6] at 10, 11, 12, 13.

4 With the close of fact discovery now just three short months away, these
 5 moving-target litigation tactics must come to an end. To adequately prepare for
 6 trial, WDP needs a definitive statement of the contentions that Plaintiffs intend to
 7 make at trial regarding the specific elements of their Screenplay that they allege
 8 WDP copied in making *Curse*. This information is crucial for WDP's trial
 9 preparation so that it can respond with evidence (1) that Plaintiffs appropriated the
 10 allegedly similar elements from Disney's theme park ride; (2) that the purportedly
 11 similar elements between *Curse* and the Screenplay are significantly different at the
 12 level of concrete expression; (3) that purportedly similar elements are generic to the
 13 pirate genre and are therefore not protectable in copyright; and (4) that the evidence
 14 shows that the allegedly similar elements were independently created by *Curse*
 15 writers who had no access to Plaintiffs' Screenplay.

16 WDP cannot assert these defenses effectively if it cannot pin Plaintiffs down
 17 on which elements of their Screenplay were allegedly copied by WDP and
 18 incorporated into *Curse*. And there is no question that now is the appropriate time
 19 for Plaintiffs to articulate such contentions. Plaintiffs submitted their Screenplay to
 20 WDP in 2000, and *Curse* was released in 2003. They have had nearly *twenty years*
 21 to evaluate the alleged similarities between *Curse* and their work. With expert
 22 discovery on substantial similarity complete and the close of discovery ending soon,
 23 there is no conceivable basis for Plaintiffs' continued stonewalling.

24 The Court should compel Plaintiffs to provide complete answers to WDP's
 25 Interrogatories 4, 5, 6, and 8.

26 ///

27 ///

28 ///

1 **II. PLAINTIFF SCREENWRITERS' INTRODUCTORY STATEMENT**

2 The parties' dispute over substantial similarity is ready for trial. Several years
 3 ago, the Ninth Circuit rejected Disney's arguments that the Plaintiff Screenwriters'
 4 *Pirates* screenplay is not substantially similar to Disney's *Pirates* film as a matter of
 5 law. The parties have completed discovery on the subject, including through dueling
 6 experts who disagree over the substantial similarity between the two works. And
 7 Judge Marshall has denied Disney's motion for summary judgment on that same
 8 issue as well, along with Disney's motion to certify that denial to the Ninth Circuit.

9 The parties envisioned this posture when they bifurcated fact discovery into
 10 two phases. On remand from the Ninth Circuit, the parties streamlined fact and
 11 expert discovery on substantial similarity in Phase 1, so that Disney could enjoy the
 12 benefit of an early summary judgment motion. While Disney enjoyed that benefit, it
 13 now seeks to backtrack on that stipulation because it does not like the result from
 14 Judge Marshall. Consider Disney's position now that Plaintiff Screenwriters are
 15 "wrong" that "[t]he purpose of the stipulation was that substantial similarity would
 16 be *resolved* in Phase 1." Disney Points and Contentions, §IV.B. Yet Disney's
 17 counsel represented the exact opposite when it negotiated and induced the original
 18 stipulation on bifurcation: "As we agreed during the call, the purpose of bifurcating
 19 discovery is so that substantial similarity can be *resolved* before proceeding to
 20 discovery [on] *other* issues." Hilvert Decl. ¶8 Ex. D (emphasis added). Disney's
 21 efforts to relitigate substantial similarity in Phase 2 discovery does not honor the
 22 purpose or the plain language of the parties' agreement or corresponding order.

23 The plain language of Disney's four overlapping and burdensome contention
 24 interrogatories addresses substantial similarity, not any affirmative defense. Indeed,
 25 these interrogatories are about elements in the film that are "copied," "infringed,"
 26 and "original"— topics that underlie a substantial similarity analysis and which the
 27 parties litigated in Phase 1. Nor has Disney justified why it would need four separate

1 “all facts” contention interrogatories on the same subject under any scenario. The
2 Court should deny Disney’s motion.

3 **III. INTERROGATORIES IN DISPUTE**

4 **INTERROGATORY NO. 4:**

5 Identify and describe with particularity each element of YOUR
6 SCREENPLAY that you contend DEFENDANT infringed.

7 **ANSWER TO INTERROGATORY NO. 4:**

8 Plaintiffs object to this Interrogatory as seeking discovery on questions of
9 substantial similarity in violation of the parties’ stipulation, which provides that
10 discovery is bifurcated. *See* Dkt. No. 121. After the Ninth Circuit remanded this
11 case, the parties stipulated to phased discovery—at Disney’s suggestion—to best
12 expedite the litigation. That agreement was predicated on a shared interest “in
13 streamlining this action by reducing the number of named defendants and
14 establishing certain mutually-agreeable timeframes regarding discovery, motion
15 practice, and ADR.” *Id.* ¶ 1. To that end, the parties agreed to a “phased” approach
16 to discovery, under which fact discovery would be bifurcated into two phases.
17 “[D]iscovery in the first phase [was] limited to the issue of substantial similarity.”
18 *Id.* ¶ 10. The Parties completed that phase, including through expert reports and
19 depositions. Disney then filed its summary judgment motion, which the Court
20 denied.

21 After the Court’s denial of summary judgment, this case moved into the
22 “second phase” of discovery. That “second phase” encompasses “other discovery”
23 *not relating to* substantial similarity. *See id.* ¶ 10(a). Thus, pursuant to the Court’s
24 adoption of the parties’ stipulation, this “second phase” is limited to issues *other*
25 than substantial similarity.

26 On the basis of their objection, Plaintiffs will not respond to this
27 Interrogatory.

1 **INTERROGATORY NO. 5:**

2 Identify all facts that support or refute YOUR contention that each component
 3 identified in response to Interrogatory 4 above contains original expression that is
 4 subject to protection under copyright law.

5 **ANSWER TO INTERROGATORY NO. 5:**

6 Plaintiffs object to this Interrogatory as seeking discovery on questions of
 7 substantial similarity in violation of the parties' stipulation, which provides that
 8 discovery is bifurcated. *See* Dkt. No. 121. After the Ninth Circuit remanded this
 9 case, the parties stipulated to phased discovery—at Disney's suggestion—to best
 10 expedite the litigation. That agreement was predicated on a shared interest "in
 11 streamlining this action by reducing the number of named defendants and
 12 establishing certain mutually-agreeable timeframes regarding discovery, motion
 13 practice, and ADR." *Id.* ¶ 1. To that end, the parties agreed to a "phased" approach
 14 to discovery, under which fact discovery would be bifurcated into two phases.
 15 "[D]iscovery in the first phase [was] limited to the issue of substantial similarity."
 16 *Id.* ¶ 10. The Parties completed that phase, including through expert reports and
 17 depositions. Disney then filed its summary judgment motion, which the Court
 18 denied.

19 After the Court's denial of summary judgment, this case moved into the
 20 "second phase" of discovery. That "second phase" encompasses "other discovery"
 21 *not relating to* substantial similarity. *See id.* ¶ 10(a). Thus, pursuant to the Court's
 22 adoption of the parties' stipulation, this "second phase" is limited to issues *other*
 23 than substantial similarity.

24 Plaintiffs further object to the requirement to provide "all facts" as overbroad
 25 and unduly burdensome. *See Philips N. Am. LLC v. PKI Healthcare, Inc.*, No.
 26 SACV 19-01765-JVS (JDE), 2020 WL 3031614, at *2-3 (C.D. Cal. Mar. 10, 2020)
 27 (collecting cases and noting that interrogatories demanding "all details, facts, and
 28 information . . . [are] facially overbroad, unduly burdensome, and disproportionate

1 to the needs of the case.”). Plaintiffs further object to the interrogatory to the extent
2 as not proportional to the needs of case as it calls for a legal conclusion on
3 individual components and is inconsistent with the Ninth Circuit’s direction to apply
4 the original selection and arrangement of elements.

5 On the basis of their objections, Plaintiffs will not respond to this
6 Interrogatory.

7 **INTERROGATORY NO. 6:**

8 Identify and describe with particularity each element of CURSE or any of the
9 SEQUEL MOVIES that YOU contend infringed YOUR copyright in THE
10 SCREENPLAY.

11 **ANSWER TO INTERROGATORY NO. 6:**

12 Plaintiffs object to this Interrogatory as seeking information not relevant to
13 any party’s claims or defenses in that it requests information how “any of the
14 SEQUEL MOVIES” infringe Plaintiffs’ Screenplay, which is not a claim asserted in
15 the First Amended Complaint (and as explained at the summary judgment hearing).
16 (For the avoidance of doubt, and as explained, Disney’s profits from the Sequels are
17 relevant to an award of damages for Disney’s infringement of the Pirates
18 Screenplay.)

19 Plaintiffs object to this Interrogatory as seeking discovery on questions of
20 substantial similarity in violation of the parties’ stipulation, which provides that
21 discovery is bifurcated. *See* Dkt. No. 121. After the Ninth Circuit remanded this
22 case, the parties stipulated to phased discovery—at Disney’s suggestion—to best
23 expedite the litigation. That agreement was predicated on a shared interest “in
24 streamlining this action by reducing the number of named defendants and
25 establishing certain mutually-agreeable timeframes regarding discovery, motion
26 practice, and ADR.” *Id.* ¶ 1. To that end, the parties agreed to a “phased” approach
27 to discovery, under which fact discovery would be bifurcated into two phases.
28 “[D]iscovery in the first phase [was] limited to the issue of substantial similarity.”

1 *Id.* ¶ 10. The Parties completed that phase, including through expert reports and
 2 depositions. Disney then filed its summary judgment motion, which the Court
 3 denied.

4 After the Court’s denial of summary judgment, this case moved into the
 5 “second phase” of discovery. That “second phase” encompasses “other discovery”
 6 *not relating to* substantial similarity. *See id.* ¶ 10(a). Thus, pursuant to the Court’s
 7 adoption of the parties’ stipulation, this “second phase” is limited to issues *other*
 8 than substantial similarity.

9 On the basis of their objection, Plaintiffs will not respond to this
 10 Interrogatory.

11 **INTERROGATORY NO. 8:**

12 Identify all facts that support YOUR contention that DISNEY copied YOUR
 13 SCREENPLAY in the conception, creation, development, or production of CURSE
 14 or any of the SEQUEL MOVIES.

15 **ANSWER TO INTERROGATORY NO. 8:**

16 Plaintiffs object to this Interrogatory as overbroad and unduly burdensome in
 17 that it requests identification of “all facts.” *See Philips N. Am. LLC v. PKI*
Healthcare, Inc., 2020 WL 3031614, at *2-3 (C.D. Cal. Mar. 10, 2020) (collecting
 19 cases and noting that interrogatories demanding “all details, facts, and information .
 20 . . [are] facially overbroad, unduly burdensome, and disproportionate to the needs of
 21 the case.”). Plaintiffs object to this Interrogatory as seeking information not relevant
 22 to any party’s claims or defenses in that it requests information how “any of the
 23 SEQUEL MOVIES” infringe Plaintiffs’ Screenplay, which is not a claim asserted in
 24 the First Amended Complaint (and as explained at the summary judgment hearing).
 25 (For the avoidance of doubt, and as explained, Disney’s profits from the Sequels are
 26 relevant to an award of damages for Disney’s infringement of the Pirates movie.)
 27 Plaintiffs further object to this Interrogatory as seeking discovery on questions of
 28 substantial similarity in violation of the parties’ stipulation, which provides that

1 discovery is bifurcated. *See* Dkt. No. 121. After the Ninth Circuit remanded this
 2 case, the parties stipulated to phased discovery—at Disney’s suggestion—to best
 3 expedite the litigation. That agreement was predicated on a shared interest “in
 4 streamlining this action by reducing the number of named defendants and
 5 establishing certain mutually-agreeable timeframes regarding discovery, motion
 6 practice, and ADR.” *Id.* ¶ 1. To that end, the parties agreed to a “phased” approach
 7 to discovery, under which fact discovery would be bifurcated into two phases.
 8 “[D]iscovery in the first phase [was] limited to the issue of substantial similarity.”
 9 *Id.* ¶ 10. The Parties completed that phase, including through expert reports and
 10 depositions. Disney then filed its summary judgment motion, which the Court
 11 denied.

12 After the Court’s denial of summary judgment, this case moved into the
 13 “second phase” of discovery. That “second phase” encompasses “other discovery”
 14 *not relating to* substantial similarity. *See id.* ¶ 10(a). Thus, pursuant to the Court’s
 15 adoption of the parties’ stipulation, this “second phase” is limited to issues other
 16 than substantial similarity.

17 On the basis of their objections, Plaintiffs will not respond to this
 18 Interrogatory.

19 IV. WDP’S CONTENTIONS AND POINTS AND AUTHORITIES

20 A. **WPD Served Targeted Contention Interrogatories That Are 21 Proper And Necessary To Narrow The Issues Remaining For Trial**

22 Contention interrogatories, which request that a party state its legal
 23 contentions or the facts supporting those contentions, are “generally proper.”
 24 *Stamps.Com*, 2009 WL 2576371, at *2 (compelling responses to contention
 25 interrogatories in a patent infringement case that sought infringement and invalidity
 26 arguments for each of plaintiff’s patent claims).¹ Such interrogatories serve as “a

27 ¹ Contention interrogatories are such a well-established discovery mechanism that
 28 disputes over contention interrogatories typically involve, not *whether* they are

1 useful tool to narrow the issues in dispute.” *Protective Optics, Inc. v. Panoptx, Inc.*,
 2 2007 WL 963972, at *2 (N.D. Cal. Mar. 30, 2007) (compelling responses to a
 3 contention interrogatory seeking identification of claim limitations allegedly
 4 practiced by the accused product). “Answers to contention interrogatories also serve
 5 to narrow and sharpen the issues thereby confining discovery and simplifying trial
 6 preparation.” *Asia Vital Components Co. v. Asetek Danmark A/S*, 377 F. Supp. 3d
 7 990, 1003 (N.D. Cal. 2019) (quoting *Woods v. DeAngelo Marine Exhaust, Inc.*, 692
 8 F.3d 1272, 1280 (Fed. Cir. 2012)).

9 WDP served four targeted contention interrogatories on Plaintiffs:

- 10 • **Interrogatory 4** asks Plaintiffs to identify every element of the Screenplay
 11 that WDP allegedly infringed.
- 12 • **Interrogatory 5** asks Plaintiffs to state all facts supporting the contention that
 13 the elements identified in Interrogatory 4 constitute original expression that is
 14 subject to protection under copyright law.²

15 _____
 16 proper, but *when* they are proper, i.e., whether they are premature and should be
 17 deferred until discovery is complete or a pretrial conference is held. *See* Fed. R.
 18 Civ. P. 33(a)(2). Plaintiffs do not object on the basis that WDP’s requests are
 19 premature and have therefore waived any such argument. *O. L. v. City of El Monte*,
 20 2021 WL 926105, at *3 (C.D. Cal. Jan. 11, 2021) (citing cases finding failure to
 21 raise objection in responding to interrogatories waives it). In any event, WDP’s
 22 requests are not premature. *See, e.g., In re Northrop Grumman Corp. ERISA Litig.*,
 23 2010 WL 11468588, at *3 (C.D. Cal. May 17, 2010) (contention interrogatories
 24 appropriate where claims had been pending, plaintiff had time to review defendant’s
 25 document production, and discovery would close in three months).

26 ² Copyright only protects concrete expression, not general plot ideas, generic
 27 elements, genre tropes, or *scenes-a-faire*. *Funky Films, Inc. v. Time Warner Ent.*
 28 *Co.*, 462 F.3d 1072, 1081 (9th Cir. 2006). In opposing summary judgment,
 Plaintiffs relied on the “selection and arrangement” doctrine, which holds, in certain
 narrow circumstances, that a novel selection and arrangement of generic elements
 can itself constitute protectable expression. *Metcalf v. Bochco*, 294 F.3d 1069, 1074
 (9th Cir. 2002). Interrogatory 5 is intended to help WDP distinguish between the
 common elements that Plaintiffs contend are non-generic protectable expression and
 the common elements that Plaintiffs contend are unprotectable in themselves but
 subject to the selection-and-arrangement doctrine.

- 1 • **Interrogatory 6** asks Plaintiffs to identify every element of *Curse* or its
2 sequels that allegedly infringes the Screenplay.³
- 3 • **Interrogatory 8** asks Plaintiffs to state all facts that support their contention
4 that WDP copied the Screenplay.

5 These interrogatories are straightforward: Plaintiffs should be compelled to state the
6 elements of their Screenplay that they claim WDP infringed and all facts in support
7 so the parties know the issues in dispute as they prepare for trial.

8 The alleged similarities between Plaintiffs' work and WDP's will be a
9 paramount issue at trial, and Plaintiffs' contentions on that issue should not be a
10 guessing game. *See, e.g., Tennison*, 226 F.R.D. at 618 (granting motion to compel
11 responses to contention interrogatories because defendant "should not have to
12 guess" at facts underpinning plaintiff's claims). Plaintiffs will have the burden at
13 trial to identify for the jury the elements of their Screenplay that they allege WDP
14 both copied and unlawfully appropriated—as well as the facts that support their
15 claim of copyright infringement. *See, e.g., Rentmeester v. Nike, Inc.*, 883 F.3d 1111,
16 1117 (9th Cir. 2018) (plaintiff must prove "substantial similarity" which includes
17 "both the degree of similarity relevant to proof of copying and the degree of
18 similarity necessary to establish unlawful appropriation"). WDP has a right to know
19 what Plaintiffs contend so it can prepare its defenses.⁴ Such contention

20
21 ³ Plaintiffs have stated in meet-and-confer calls that they are *not* contending that the
22 *Curse* sequels infringe their Screenplay, but have so far refused to commit to that
23 position in verified interrogatory responses. One further reason why WDP seeks an
24 answer to Interrogatory 6 is to obtain a definitive answer on Plaintiffs' infringement
25 contentions regarding the sequels.

26 ⁴ On summary judgment the Court held that competing expert opinions precluded a
27 finding that Plaintiffs' Screenplay is not substantially similar to *Curse* as a matter of
28 law, and the unresolved question of substantial similarity will be decided by the jury
at trial. And even once the jury decides that issue, WDP could move for judgment
as a matter of law on the substantial similarity issue. *See Gray v. Hudson*, __ F.4th
____, 2022 WL 711246, at *10 (9th Cir. Mar. 10, 2022) ("A trial judge has had the
benefit of hearing testimony and a full presentation of the evidence when ruling on a

1 interrogatories “will advance the litigation as it will pin down [Plaintiffs’] position
2 as the parties prepare for trial.” *Tennison*, 226 F.R.D. at 618.

3 Courts addressing similar contention interrogatories in the context of
4 infringement allegations have compelled responses precisely so the defendant is not
5 left guessing at trial:

6 At trial [plaintiff] is going to have to identify the allegedly infringing
7 software and explain why it is infringing—it will need to say *something*
8 about those issues simply as part of putting on its case.... Whatever
9 [plaintiff’s] copyright case is at this point, it needs to disclose it to
10 [defendant]. At this late date, [defendant] should not be in the position
of having to guess what [plaintiff’s] theories will be at trial concerning
what the allegedly infringing software is and how it is similar to
[plaintiff’s] software.

11 *AutoOpt Networks, Inc. v. Karani*, 2018 WL 4558270, at *2 (N.D. Cal. Sept. 20,
12 2018) (compelling a response to a contention interrogatory requiring identification
13 of all similarities in a copyright case where plaintiff had sufficient discovery to
14 answer the interrogatory in order to give defendant notice of plaintiff’s theories for
15 trial).

16 The reasoning in *AutoOpt Networks* is on point. The plaintiff in that case had
17 “some information with which to answer the interrogatory,” including, most
18 importantly, copies of the software programs. 2018 WL 4558270, at *1. The court
19 held that plaintiff could not continue to refuse to answer the interrogatory because
20 “it [wasn’t] waiting for anything.” *Id.* at *2. That case was at the close of fact and
21 expert discovery, but certain depositions remained. *Id.* (“fact and expert discovery
22 closed ... except for specified depositions”).

23 Here, the key evidence relevant to Plaintiffs’ infringement contentions—the
24 contents of Plaintiffs’ Screenplay and WDP’s *Curse* motion picture—has been
25

26 post-trial JMOL motion, which may occasionally give her new insights into the
27 legal sufficiency of the evidence. While JMOL and summary judgment are
28 procedurally similar, there is no rule preventing a trial judge from reconsidering her
views on a case’s merits.” (citation omitted)).

1 known to Plaintiffs for literally decades. Plaintiffs filed this lawsuit in 2017,
2 fourteen years after the alleged infringement. Both before and after filing suit,
3 Plaintiffs and their attorneys have had ample time to determine what elements they
4 intended to claim were infringed. Further, WDP has completed its production of
5 substantially all relevant documents and the parties have exchanged substantial
6 similarity expert reports and conducted expert depositions of those witnesses.
7 Segall Decl. ¶¶ 10, 20. By the time this motion is heard, Plaintiffs will have taken
8 several key depositions, including of executives and writers of *Curse*. *Id.* ¶ 15. In
9 fact, Plaintiffs have compiled various (and often contradictory) lists of alleged
10 similarities at different points during this litigation, including in their original
11 Complaint, First Amended Complaint, motion to dismiss briefing, appellate briefs to
12 the Ninth Circuit, summary judgment briefing, and their substantial similarity
13 expert's reports. *Compare, e.g., id.* Ex. 5 ¶¶ 8–13 (substantial similarity contentions
14 in original Complaint), *with id.* Ex. 6 ¶¶ 79–118 (substantial similarity contentions
15 in FAC), *and id.* Ex. 7 (substantial similarity contentions in expert report of David
16 Román). As was true of the defendant in *AutoOpt Networks*, WDP is simply asking
17 for Plaintiffs' final contentions now that fact discovery is nearly complete:
18 whatever Plaintiff believes to be the similar elements between the Screenplay and
19 *Curse*, it must disclose them so WDP is not guessing at Plaintiffs' theories as it
20 deposes Plaintiffs and prepares for trial. *AutoOpt Networks*, 2018 WL 4558270, at
21 *2.

22 The equities and judicial economy also favor compelling Plaintiffs to respond
23 to WDP's contention interrogatories. WDP will be prejudiced if it does not have a
24 complete list of the elements that Plaintiffs contend were infringed. WDP cannot
25 readily prepare its defenses if it cannot pinpoint what expression Plaintiffs claim
26 was infringed. Likewise, judicial economy is disserved if WDP must guess at
27 Plaintiffs' alleged similarities from the various contradictory pleadings and filings
28 Plaintiffs have prepared in five years of litigation—the trial will take longer and

1 WDP will expend substantial resources preparing unnecessary defensive evidence,
 2 experts, and witnesses to address possible similarities that Plaintiffs do not intend to
 3 assert at trial. *Cf. Asia Vital Components*, 377 F. Supp. 3d at 1004 (patent rules
 4 were “designed to require parties to crystallize their theories of the case early in the
 5 litigation and to adhere to those theories once they have been disclosed” (citations
 6 omitted)).

7 Plaintiffs suffer no hardship, burden, or prejudice in answering WDP’s
 8 interrogatories. As noted above, Plaintiffs have *already* compiled various lists of
 9 alleged similarities and presumably believe they have evidence to support at least
 10 some of those claims. *Tennison*, 226 F.R.D. at 618 (“At this juncture, discovery is
 11 nearly complete, and hence Plaintiff is in a position to provide meaningful
 12 answers.”). Plaintiffs’ reason for not responding is purely tactical.⁵ They have
 13 benefitted thus far from ambiguously framing the alleged similarities at the most
 14 general level and then making statements like “Professor Román’s opinion detailed
 15 *scores more similarities across all factors in the extrinsic test.*” Segall Decl. Ex. 10
 16 [Dkt. 206] at 6 (emphasis added).

17 Plaintiffs surely believe they are strategically well-served by refusing to be
 18 pinned down on their contentions about the similarities between the works—
 19 particularly where, as here, the works have few concrete elements in common and
 20 most of Plaintiffs’ purported “similarities” are familiar adventure-movie tropes like
 21 humor, romance, and a Caribbean setting. But Plaintiffs’ obstruction does not serve
 22 the aims of a “just, speedy, and inexpensive determination” of this action as required
 23

24 ⁵ To the extent Plaintiffs claim they are still developing their theory, that is not a
 25 reason to deny this motion. Plaintiffs are not foreclosed from amending their
 26 interrogatories under appropriate circumstances: “[b]ecause ‘answers to contention
 27 interrogatories evolve over time as theories of liability and defense begin to take
 28 shape Rule 26(e) requires that as theories mature and as the relevance of various
 items of evidence changes, responses to interrogatories, and particularly contention
 interrogatories, be corrected or supplemented to reflect those changes.” *Asia Vital
 Components*, 377 F. Supp. 3d at 1003–04 (citing *Woods*, 692 F.3d at 1280).

1 by Rule 1 of the Federal Rules of Civil Procedure. Courts regularly compel
 2 responses to contention interrogatories where, as here, WDP is “entitled to know the
 3 basis of, and information regarding plaintiffs’ contentions on the matters that are the
 4 subjects of the contention Interrogatories in Issue while discovery is ongoing so that
 5 they may appropriately focus and conduct any further discovery in a timely
 6 fashion.” *Williams v. City of Long Beach*, 2019 WL 11318323, at *5 (C.D. Cal.
 7 May 30, 2019) (compelling responses to contention interrogatories demanding all
 8 facts supporting certain claims); *see also Mosaic Brands, Inc v. Ridge Wallet LLC*,
 9 2020 WL 12048883, at *7 (C.D. Cal. Nov. 2, 2020) (compelling a response to a
 10 contention interrogatory seeking for plaintiff to identify all facts supporting claimed
 11 equivalencies and all instances of alleged infringement).

12 **B. Plaintiffs’ Claim That The Parties’ Prior Discovery Stipulation
 13 Prohibits Fact Discovery on Substantial Similarity Is Frivolous**

14 Plaintiffs’ principal objection to answering the contention interrogatories at
 15 issue is that “discovery on questions of substantial similarity” is “in violation of” the
 16 parties’ prior agreement to bifurcate discovery. This objection is flatly inconsistent
 17 with the plain meaning of that stipulation.

18 The record reflects that the parties agreed to bifurcate discovery not to
 19 confine fact discovery on substantial similarity to a first phase, but rather to
 20 facilitate the district court’s efficient resolution of an early dispositive motion. By
 21 way of background, courts in the Ninth Circuit routinely grant judgment for
 22 defendants in copyright cases at the motion to dismiss or summary judgment stage
 23 on the ground that the works at issue are not substantially similar as a matter of law.
 24 *See, e.g., Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d
 25 1157, 1164 (9th Cir. 1977) (substantial similarity “may often be decided as a matter
 26 of law”). The district court here granted WDP’s motion to dismiss Plaintiffs’
 27 complaint on precisely that ground. *See Segall Decl. Ex. 8 [Dkt. 93]* (dismissing
 28 complaint without leave to amend). The Ninth Circuit reversed, holding that expert

1 testimony could help inform the question of substantial similarity, particularly by
2 distinguishing “unprotected generic, pirate-movie tropes” from protectable
3 expression. *Alfred v. Walt Disney Co.*, 821 F. App’x 727, 729 (9th Cir. 2020).

4 On remand, WDP indicated that it intended to renew on summary judgment
5 its argument that the works are not substantially similar as a matter of law. Fact
6 discovery was not needed to tee up WDP’s new motion on substantial similarity,
7 because that motion entailed only an objective comparison of the similarities
8 between the two works, which were already before the Court and the contents of
9 which were undisputed. The only thing that needed to be added to the record before
10 WDP could file its summary judgment motion on substantial similarity was the
11 expert testimony that the Ninth Circuit had suggested could help inform the Court’s
12 analysis of substantial similarity. Accordingly, WDP proposed that discovery be
13 bifurcated to facilitate the efficient resolution of WDP’s summary judgment motion
14 without burdensome and costly fact discovery. *See Segall Decl.* ¶¶ 4–5. In phase 1,
15 the parties would be limited to expert discovery on substantial similarity; and then,
16 in phase 2—if the case survived WDP’s summary judgment motion—discovery
17 would open on all issues. *Id.*

18 The text of the stipulation confirms that this was the parties’ agreement, and
19 belies Plaintiffs’ argument that the stipulation was intended to *prohibit* fact
20 discovery on substantial similarity in phase 2. *See Segall Decl.* Ex. 3 [Dkt. 121].
21 The stipulation provided that discovery would be bifurcated, with “[d]iscovery in
22 the first phase limited to the issue of substantial similarity.” *Id.* ¶ 10(a). The
23 stipulation went on to clarify that phase 1 discovery would be limited to *expert*
24 discovery on substantial similarity:

25 *More specifically*, in the first discovery phase discovery shall be
26 limited to: (i) initial disclosures under Federal Rule of Civil Procedure
27 26(a)(1), which shall be made by January 29, 2021; expert disclosures
28 under Federal Rule of Civil Procedure 26(a)(2) relating to the issue of
substantial similarity, which shall be made by March 30, 2021; and (iii)
one deposition of each side’s respective expert witnesses on substantial
similarity.

1 *See id.* ¶ 10(b) (emphasis added). In other words, *all* non-expert discovery (on *any*
 2 issue) was prohibited in phase 1—including document requests, fact depositions,
 3 and written discovery. The parties further stipulated that phase 2 of discovery
 4 would only commence if the case did not settle and the Court denied WDP’s motion
 5 for summary judgment on substantial similarity. In that circumstance, the
 6 stipulation provided that phase 2 discovery “shall commence **on all issues with no**
 7 **limitations other than as provided herein or by law.**” *Id.* ¶ 15.

8 On January 19, 2020, the Court issued an order bifurcating discovery pursuant
 9 to the parties’ stipulation. *See Segall Decl. Ex. 4 [Dkt. 122].* The Court’s
 10 bifurcation order provided that, while discovery in phase 1 would be limited to
 11 initial disclosures and *expert* discovery on substantial similarity, discovery in phase
 12 2 would “encompass all issues”:

13 Discovery in the second phase shall commence following the
 14 Court’s rulings on Walt Disney Pictures’ motion for summary judgment,
 15 or immediately after mediation if Walt Disney Pictures elects not to file
 16 a motion for summary judgment. **The second phase of discovery shall**
encompass all issues, without limitation other than as provided herein
 or by law.

17 *Id.* ¶ 7 (emphasis added). Notably, nothing in the order purported to limit the
 18 subject matter of discovery in phase 2.

19 The stipulation and the Court’s bifurcation order refute Plaintiffs’ objection
 20 that the second phase of discovery is limited to “‘other discovery’ *not relating to*
 21 substantial similarity.” *See Segall Decl. Ex. 2 [Interrogatory Responses]* at 7. The
 22 order provides that phase 2 of discovery encompasses “all issues, without limitation
 23 other than as provided herein or by law.” *Id.* Ex. 4 [Dkt. 122]. Neither anything in
 24 the order, nor any legal provision, prohibits fact discovery on substantial similarity.
 25 Indeed, they provide that such discovery is fair game now.

26 Plaintiffs’ argument amounts to the illogical proposition that the parties
 27 agreed, *sub silentio*, to prohibit non-expert discovery on substantial similarity
 28 altogether. As noted, the Court’s bifurcation order limited discovery in phase 1 to

1 expert discovery. *See id.* ¶ 5 (providing that phase 1 discovery “shall be limited to”
 2 Rule 26(a)(1) initial disclosures, expert disclosures and reports, and “one deposition
 3 of each side’s respective expert witnesses on substantial similarity”). Plaintiffs’
 4 objection may have had some purchase if WDP had an opportunity to serve
 5 interrogatories regarding Plaintiffs’ substantial similarity contentions in phase 1 but
 6 elected not to. Instead, WDP *could not* have served the interrogatories at issue in
 7 phase 1, because only *expert* discovery was allowed in that phase. In other words, if
 8 Plaintiffs were correct that the Court intended to prohibit discovery on substantial
 9 similarity in phase 2, the bifurcation stipulation would have the effect of prohibiting
 10 fact discovery on substantial similarity altogether—resulting in the parties mutually
 11 forfeiting the right to discover documents, serve written discovery, or ask deposition
 12 questions regarding the alleged similarities between the works.⁶ The parties would
 13 never agree to such an arrangement, and the record clearly reflects they did not do
 14 so.

15 Plaintiffs’ construction of the parties’ stipulation appears to be a contrivance
 16 to give them an escape hatch for discovery they prefer (understandably) not to
 17 answer. In meet and confer, Plaintiffs contended that “[t]he purpose of the
 18 stipulation was that substantial similarity would be *resolved* in Phase 1.” Segall
 19 Decl. Ex. 13 [3/11 Arenz Email] (emphasis added). But that is wrong. The purpose
 20 of the discovery stipulation was to “[l]imit[] initial discovery to facilitate the
 21 efficient resolution of whether substantial similarity exists” between the works *as a*
 22 *matter of law* by permitting the parties to introduce the expert testimony that the
 23 Ninth Circuit had stated would help inform that question. *Id.* Ex. 3 [Dkt. 121] ¶ (b).
 24 Ultimately, the Court denied WDP’s summary judgment motion, holding that
 25

26 ⁶ Plaintiffs have noticed the depositions of several of the screenwriters, producers,
 27 and executives on *Curse*, and will most surely ask about purported similarities
 28 between *Curse* and the Screenplay. Any such questioning would be wholly
 inconsistent with Plaintiffs’ refusal to answer the four interrogatories at issue.

1 disputes of facts precluded the issue from being decided as a matter of law on a pre-
 2 trial motion. The Court's summary judgment order did not "resolve" the issue of
 3 substantial similarity, as Plaintiffs put it; rather, it held that "the parties' expert
 4 opinions create a genuine issue of disputed fact regarding whether the works are
 5 substantially similar" that will have to be resolved by the jury at trial. *Id.* Ex. 9
 6 [Dkt. 200] at 7. Substantial similarity remains a live issue at trial, and with fact
 7 discovery now open on "all issues," *id.* Ex. 4 [Dkt. 122] ¶ 7, WDP is entitled to use
 8 interrogatories to discover Plaintiffs' contentions regarding the purported
 9 similarities between the works.

10 **C. Even If Plaintiffs' Objections Were Meritorious, They Would Be
 11 Beside The Point, Because WDP's Interrogatories Are Highly
 12 Relevant To Issues Other Than Substantial Similarity**

13 Even if Plaintiffs were correct that the Court's bifurcation order could be
 14 interpreted to prohibit all fact discovery on substantial similarity, Plaintiffs would
 15 still be obligated to answer WDP's contention interrogatories because they are
 16 relevant to matters that are concededly the proper subject of discovery in phase 2,
 17 including (1) whether the elements that Plaintiffs allege were infringed actually
 18 derive from the Disney theme park ride that Plaintiffs' Screenplay adapted; and (2)
 19 whether WDP or third-party screenwriters independently created the elements that
 Plaintiffs claim were infringed.

20 First, WDP sought summary judgment on the ground that Plaintiffs'
 21 Screenplay is an unauthorized derivative work of Disney's Pirates of the Caribbean
 22 theme park ride, and the Court agreed with Plaintiffs that that issue was *not* covered
 23 by the parties' stipulation:

24 [T]he Court finds the issue of whether Plaintiffs' Screenplay is a
 25 derivative work of Disney's Ride is outside the scope of the parties'
 26 stipulation because it would require the Court to examine whether
 Plaintiffs' Screenplay is based on Disney's Ride and whether Disney's
 Ride is copyrightable, rather than compare whether Plaintiffs'
 Screenplay is substantially similar to Defendant's Film.
 27
 28

1 Segall Decl. Ex. 9 [Dkt. 200] at 8. Accordingly, whether the Screenplay elements
2 Plaintiffs claim were infringed were derived from the much earlier theme park ride
3 was not part of discovery phase 1. WDP has a right to know which elements
4 Plaintiffs claim were infringed, so it can develop evidence that these elements were
5 actually taken from Disney's own ride. For example, if Plaintiffs contend that
6 *Curse* infringes their Screenplay's Caribbean setting or depiction of skeleton-faced
7 pirates (as in fact Plaintiffs have), WDP can show the jury that these elements
8 already existed in the ride that serves as the source material for both parties' works
9 and therefore cannot serve as the basis for a copyright claim. But WDP cannot
10 identify which of the alleged similarities between the works have a common source
11 in the ride until Plaintiffs answer the contention interrogatories at issue.

12 Second, the contention interrogatories are relevant to WDP's independent
13 creation defense, which is clearly not covered by the stipulation. WDP will seek to
14 prove at trial that the alleged similarities between the Screenplay and *Curse* were in
15 fact independently created by WDP and/or third-party screenwriters, either because
16 they appeared in written treatments before Plaintiffs submitted their Screenplay or
17 because they were conceived by screenwriters who never had access to Plaintiffs'
18 Screenplay.

19 WDP's substantial similarity defense depends on WDP knowing which
20 elements of the Screenplay Plaintiffs claim were infringed, so it can develop
21 relevant proof of independent creation. For example, if Plaintiffs contend they (and
22 only they) came up with the idea of using supernatural elements, WDP needs to
23 know precisely what they are claiming *Curse* infringed so they can determine which
24 of the writers introduced that element to the *Curse* script. WDP is already
25 prejudiced by Plaintiffs' failure to answer these interrogatories in advance of the
26 depositions of executives and writers for the *Curse* film. While Plaintiffs may know
27 which elements they intended to claim were infringed; WDP does not and therefore
28 cannot ask the witnesses about their independent conception, development, and

1 creation of such elements during the depositions. If these witnesses become
2 unavailable for trial, WDP will not have had a fair opportunity to develop that
3 testimony.

4 **V. PLAINTIFF SCREENWRITERS' CONTENTIONS AND POINTS AND
5 AUTHORITIES**

6 The Plaintiffs Screenwriters have pursued their claim that Disney copied their
7 *Pirates* screenplay since 2017. Disney has aggressively defended this case at every
8 stage since. Disney first moved to dismiss the Screenwriters' complaint on the issue
9 of substantial similarity. After the district court granted that motion, the
10 Screenwriters appealed.

11 The Ninth Circuit reversed. The Ninth Circuit held that the district court erred
12 by "failing to compare the original selection and arrangement of the unprotectible
13 elements between the two works." *Alfred v. Disney*, 821 F. App'x 727, 729 (9th Cir.
14 2020). And based on its own review, the Ninth Circuit found that "the selection and
15 arrangement of the similarities between [the two works] is more than de minimis."
16 *Id.* The court also invited expert testimony about whether these similarities were
17 "qualitatively significant." *Id.* Disney then petitioned for en banc review of this
18 memorandum disposition, which the Ninth Circuit denied. Hilvert Decl. ¶ 3.

19 On remand, Disney wanted to bifurcate discovery. Hilvert Decl. ¶4. Disney
20 sought to expedite its motion for summary judgment on substantial similarity as
21 soon as possible. The parties negotiated a stipulation to bifurcate discovery by issue
22 as a result. Phase 1 would address substantial similarity with limited discovery. *Id.*
23 Phase 2 would address all other issues. *Id.* Indeed, in Disney's counsel's own words,
24 "the purpose of bifurcating discovery is so that substantial similarity can be *resolved*
25 before proceeding to discovery *other* issues." *Id.* at ¶8, Ex. D (emphasis added). The
26 parties filed their stipulation and the Court bifurcated discovery into phases as a
27 result. Segall Decl. Ex. 3 at ¶10, Ex. 4 at ¶4.

28

1 The parties stipulated that they needed little fact discovery for Phase 1. While
2 Disney originally envisioned several fact depositions and document requests (*id.* Ex.
3 B at pg. 3), the parties’ thereafter agreed to streamline Phase 1 even further to focus
4 on expert discovery. *Id.* Ex. E at pg. 3. This stipulation was designed at Disney’s
5 interest in expediting its summary judgment motion as soon as possible. To that end,
6 the Screenwriters’ served an expert report from a tenured professor at the
7 University of Southern California. Segall Decl. Ex. 7. He opined about the
8 qualitative significance of the elements that the Ninth Circuit found similar between
9 the two works. *Id.* Professor Román also detailed his opinion on each of the eight
10 factors that make up the extrinsic test. *Id.* Disney served a rebuttal report who
11 disagreed with Professor Román and concluded that the elements in the screenplay
12 were not novel. Hilvert Decl. Ex. ¶13 Ex. F. Professor Román then served a rebuttal
13 to Disney’s report. Hilvert Decl. ¶14. Ex. G. And the parties deposed the experts
14 over four days and 800 pages of testimony. Hilvert Decl. ¶15-16.

15 Disney then moved for summary judgment last fall. Yet Disney backtracked
16 on the plain language of the stipulation—for the first time—in its motion for
17 summary judgment. In the stipulation, the parties agreed that “Walt Disney Pictures
18 may file a motion for summary judgment on *only* the issue of substantial similarity”
19 in Phase 1. Segall Decl. Ex. 3 at ¶14 (emphasis added). Even so, Disney’s motion
20 for summary judgment was not so limited. Disney argued that the screenplay was an
21 unauthorized derivative work—Disney’s thirteenth affirmative defense—aside from
22 its argument that works were not substantially similar.

23 Judge Marshall rejected both arguments from Disney. On substantial
24 similarity, the Court applied routine summary judgment principles to deny the
25 parties’ clear fact dispute. Segall Decl. Ex. 9 at pg. 7 (“the parties’ expert opinions
26 create a genuine issue of disputed fact regarding whether the works are substantially
27 similar, [so] the Court denies Defendant’s Motion for Summary Judgment on the
28 issue of substantial similarity.”). Judge Marshall also rejected Disney’s efforts to

1 renege on the parties' clear stipulation. *Id.* at pg. 8 ("the Court finds the issue of
 2 whether Plaintiffs' Screenplay is a derivative work of Disney's Ride is outside the
 3 scope of the parties' stipulation"). Thus, the Court denied Disney's motion for
 4 summary judgment and the case went on to Phase 2.

5 Unsatisfied and undeterred, Disney moved to certify Judge Marshall's order
 6 on summary judgment to the Ninth Circuit. Hilvert Decl. ¶17. Judge Marshall
 7 denied this motion in early March. Hilvert Decl. ¶18, Ex. H. As a result, the parties
 8 need only complete discovery in Phase 2, on topics like damages and Disney's
 9 affirmative defenses, before the parties may finally resolve this case on the merits at
 10 trial in February 2023. Yet as this motion shows, Disney is not done with its
 11 scorched-earth effort to relitigate substantial similarity.

12 A. **The Court should deny Disney's motion to compel because
 13 discovery on substantial similarity falls outside the parties'
 14 stipulation to bifurcate discovery into two phases.**

15 Disney's contention interrogatories about substantial similarity are improper
 16 for Phase 2. The essential quid-pro-quo for Disney's proposed bifurcation was to
 17 streamline discovery about substantial similarity, so Disney could proceed with an
 18 early motion for summary judgment on that issue. Disney enjoyed that benefit and
 19 lost its motion. The Court should deny Disney's effort to relitigate that same issue
 20 again now. Indeed, the plain language of the stipulation, the parties' intent for the
 21 stipulation, and common sense dictates that Phase 2 discovery is about all issues
 22 *other* than substantial similarity.

23 Disney's efforts to backtrack on its agreement to bifurcate fact discovery
 24 eliminates the efficiencies the stipulation was meant to provide. The stipulation—
 25 and corresponding order—reflects the unambiguous conclusion that fact discovery
 26 was bifurcated into two phases:

27 **Fact discovery shall be bifurcated**, with discovery in the first phase
 28 limited to the issue of substantial similarity; if **other** discovery is

1 necessary, it will occur in a second phase that will follow the parties’
 2 mediation and the Court’s resolution of Walt Disney Pictures’ intended
 3 motion for summary judgment on substantial similarity, as set forth
 below.

4 Segall Decl. Ex. 3 at ¶10 (emphasis added); *see also* Ex. 4 at ¶4. Put differently, the
 5 first phase of “fact discovery” was limited to substantial similarity. *Id.* The second
 6 phase of “fact discovery” addressed all “*other* discovery.” *Id.* (emphasis added).
 Nothing about this plain language supports Disney’s conclusion now that Phase 1
 7 was limited to fact discovery on substantial similarity, and Phase 2 encompasses all
 8 discovery with no limits.

9 Nor does the intent of the parties support Disney’s interpretation now.
 10 Perhaps most glaring is how inconsistent Disney with what it states to this Court
 11 versus how it induced the stipulation originally. Here is what Disney stated to the
 12 Court:

- 13
- 14 • “In meet and confer, Plaintiffs contended that ‘[t]he purpose of the
 15 stipulation was that substantial similarity would be *resolved* in Phase 1.’
 16 Segall Decl. Ex. 13 [3/11 Arenz Email] (emphasis added). But that is
 wrong.” Disney Points and Contentions, § IV.B.

17 Yet Disney said the exact opposite when it negotiated the stipulation for its benefit:

- 18
- 19 • “As we agreed during the call, the purpose of bifurcating discovery is
 20 so that substantial similarity can be *resolved* before proceeding to
 discovery [on] *other* issues.” Hilvert Decl. ¶8 Ex. D (emphasis added).

21 The Court should deny Disney’s motion based on these contradictory
 22 representations alone.

23 Yet there is more. Early drafts of the stipulation contemplated some fact
 24 deposition beyond what the parties ultimately agreed to. *See, e.g.*, Hilvert Decl. ¶6,
 25 Ex. B (“(b) In the first discovery phase, the parties shall be limited to three (3) fact
 26 depositions each and twenty (20) requests for production of documents.”). That the
 27 parties narrowed the stipulation further without other material changes to the
 28 bifurcation of discovery underscores that the parties knowingly limited the scope of

1 “fact discovery” on the issue of substantial similarity. Indeed, that was a core
2 element of the stipulation: Disney would get the benefit an early summary judgment
3 motion (and the ability to move for summary judgment again on other issues if the
4 first motion failed) in exchange for streamlined and limited fact discovery. Hilvert
5 Decl. ¶10. Counsel for the Screenwriters would not have agreed to the stipulation if
6 Disney could prolong the trial date through bifurcated discovery while also
7 preserving the ability to pursue unbridled discovery on substantial similarity even
8 after Judge Marshall denied summary judgment on that issue. Hilvert Decl. ¶10.

9 Disney’s hindsight interpretation also ignores other key limiting language.
10 Like a contract, the Court should not render language surplusage. *United States v.*
11 *Hathaway*, 242 F.2d 897, 900 (9th Cir.1959) (“a court must give effect to every
12 word or term employed by the parties and reject none as meaningless or surplusage
13 in arriving at the intention of the contracting parties”). Both the stipulation and order
14 state: “The second phase of discovery shall encompass all issues, without limitation
15 **other than as provided herein** or by law.” Segall Decl. Ex. 4 at ¶7 (emphasis
16 added); *see also* Ex. 3 at ¶15. If Phase 2 fact discovery is unlimited as Disney now
17 contends, then this “other than as provided herein” provision is meaningless. And
18 the conclusion that Phase 2 fact discovery would not cover substantial similarity
19 follows common sense as well: why would parties bifurcate fact discovery on an
20 issue before a motion for summary judgment if that same issue would be subject of
21 fact discovery *after* the Court found a genuine dispute of material fact on that issue?

22 Finally, Disney’s arguments about the need for this discovery ignores the
23 record. If Disney needed the discovery it now contends it so badly needs, then it
24 would have sought it before the hundreds of pages of expert reports and depositions
25 and its motion for summary judgment on that exact issue. Yet Disney’s expert had
26 no issue responding to Professor Román and expressing his opinions on substantial
27 similarity. And Disney likewise had no issue vigorously arguing that the Court
28

1 should grant summary judgment. That Disney forewent contention interrogatories in
 2 Phase 1 only confirms that it does not need them now in Phase 2.

3 **B. Disney's four overlapping and burdensome contention
 4 interrogatories address the subject of substantial similarity, not
 Disney's affirmative defenses.**

5 Disney is incorrect that these interrogatories are somehow directed at
 6 affirmative defenses. Interrogatory 4 and 6 both ask for detailed contentions about
 7 elements that are “infringed.” Interrogatory 8 is about elements that Disney
 8 “copied.” And Interrogatory 5 is about “original expression,” and courts use
 9 “original” and “protectible” interchangeably in copyright law. *See, e.g., Swirsky v.*
 10 *Carey*, 376 F.3d 841, 844 (9th Cir. 2004). The entire basis for Disney’s motion to
 11 dismiss and summary judgment was that the similarities between the two works
 12 were not protectible. These four interrogatories on their face go to the
 13 Screenwriters’ prima facie case on substantial similarity. None of these
 14 interrogatories addresses the elements of any affirmative defense.

15 Even so, the Court should not compel *four* overlapping and duplicative
 16 interrogatories under any scenario. All discovery is subject to the rule of
 17 proportionality. *See, e.g., Hernandez v. Barr*, 2019 WL 13019923, at *5 (C.D. Cal.
 18 Mar. 25, 2019) (“[t]he 2015 amendments to Rule 26(b)(1) emphasize the need to
 19 impose reasonable limits on discovery through increased reliance on the common-
 20 sense concept of proportionality”) (internal citation omitted). Disney’s four
 21 duplicative interrogatories fail this “common-sense concept of proportionality” in
 22 spades on this record. To start, the Court has already found a triable issue based on
 23 an extensive record. More discovery on this subject only serves to multiply the
 24 burden of the extensive pretrial record here.

25 Disney also fails to address each interrogatory individually. This omnibus
 26 approach is by itself is wrong. “[W]hen the dispute concerns individual objections,
 27 such a vagueness, overbreadth, or privilege, relating to individual discovery
 28 requests, and the specific language of the request and the response matter, the Joint

1 Stipulation's presentation prevents the Court from efficiently and effectively
2 considering the parties' respective positions' to the extent it uses 'an 'omnibus'
3 'legal argument' relating to all disputed discovery requests, rather than following
4 each request at issue." *See Williams v. J.B. Hunt Transport, Inc.*, 2021 WL 3265337,
5 at *8 (C.D. Cal. May 19, 2021)). Indeed, Disney offers no showing as to why it
6 needs four separate "all facts" contention interrogatories on the same subject. And
7 "all facts" contention interrogatories are overbroad and burdensome. *See Heredia v.*
8 *Sunrise Senior Living LLC*, 2020 WL 12584277, at *5 (C.D. Cal. July 20, 2020)
9 (collecting cases).

10 Even if Disney's interrogatories fell within the scope of Phase 2 discovery,
11 Disney's motion also conflicts with established law and its own position on
12 contention interrogatories. "Indeed, it is generally accepted that courts '[will] not
13 order responses to contention interrogatories until late in the pretrial period' and that
14 'the wisest general policy is to defer propounding and answering contention
15 interrogatories until near the end of the discovery period.'" *Open Text Inc. v.*
16 *Northwell Health, Inc.*, 2020 WL 6050595, at *4 (C.D. Cal. Aug. 6, 2020) (quoting
17 *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 333 (N.D. Cal. 1985)); *see also*
18 Fed. R. Civ. P. 33(a)(2), 1970 Advisory Committee Notes ("[T]he court is expressly
19 authorized to defer an answer."). And Disney took this exact position to refuse to
20 answer interrogatories served by the Screenwriters. For instance, Disney objected to
21 the Screenwriters' interrogatory about damages: "To the extent this Interrogatory
22 asks WDP to state its position regarding the amount of any profits that should be
23 apportioned to allegedly infringing or non-infringing aspects of the Film, then WDP
24 objects that this Interrogatory calls for a legal conclusion, is premature, and the
25 subject of expert testimony." *See, e.g.*, Hilvert Decl. Ex. I at 24:1-5. That Disney
26 refuses to provide its "position" on damages-related information—a proper subject
27 for Phase 2—refutes Disney's demand that the Screenwriters answer its contention
28 interrogatories now. Disney's requested relief is just make-work while the parties

1 undertake the discovery that was postponed for Phase 2. The Court should deny
2 Disney's motion.

3 **VI. PROPOSED RESOLUTIONS DURING THE CONFERENCE OF
COUNSEL**

4 **A. WDP's Proposed Resolution**

5 WDP initially addressed these contention interrogatories in a letter on
6 February 28, 2022. *See Segall Decl.* ¶ 16 & Ex. 11. WDP's letter requested that
7 Plaintiffs provide complete responses to Interrogatories 4, 5, 6, and 8. At the
8 conference of counsel on March 9, 2022, WDP reiterated that request and explained
9 that this should not be difficult given that Plaintiffs had set forth lists of similarities
10 in numerous places over time, and that WDP's request for was for Plaintiffs to
11 commit to a single, comprehensive list of similarities in a verified written discovery
12 response so the parties could narrow the issues for trial. *Id.* ¶ 17. Plaintiffs
13 responded that they believed they had no obligation to answer the interrogatories.
14 *Id.* Finally, WDP sent a second meet-and-confer letter on March 11, 2022,
15 reiterating its request for full and complete responses to these four interrogatories.
16 *Id.* ¶ 18 & Ex. 12. By email dated March 11, 2022, Plaintiffs' counsel stated that
17 Plaintiffs "will stand on our objection that the current phase of discovery excludes
18 the issue of substantial similarity." *Id.* ¶ 19 & Ex. 13.

19 **B. Plaintiff Screenwriters' Proposed Resolution**

20 Disney's position at the conference of counsel was a take-it-or-leave it
21 position. It offered no compromise. Given the plain text of the parties' stipulation,
22 fact discovery in this phase two does not address substantial similarity. Because
23 Disney's discovery addresses substantial similarity, Disney's requests are improper
24 and will lead to additional pre-trial litigation and motion practice that the bifurcation
25 stipulation and order was designed to prevent.

1 DATED: March 29, 2022

ROBINS KAPLAN LLP

2 By: /s/ Patrick M. Arenz
3 Attorneys for Plaintiffs Arthur Lee Alfred II
4 and Ezequiel Martinez, Jr.

5 DATED: March 29, 2022

6 MUNGER, TOLLES & OLSON LLP

7 By: /s/ Jordan D. Segall
8 Attorneys for Defendant Walt Disney Pictures

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